No. 453.

Filed Mar. 13, 1900.

Supreme Court of the United States,

OCTOBER TERM, 1899.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Plaintiff in Error,

vs.

GEORGE E. HILL, ELLEN KELLOGG HILL, EUGENE C. HILL, by their Guardian EBEN SMITH and ELIZA MAUDE HILL, in her own behalf,

Defendants in Error.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit. In Error to the Circuit Court for the District of Washington, Northern Division.

BRIEF OF THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, PLAINTIFF IN ERROR.

JULIEN T. DAVIES,
EDWARD LYMAN SHORT,
JOHN B. ALLEN,
FREDERIC D. McKENNEY,
Of Counsel.

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On Writ of *certiorari* to the United States Court of Appeals for the Ninth Circuit. In error to the Circuit Court for the District of Washington, Northern Division.

Brief of the Mutual Life Insurance Company of New York, Plaintiff in Error.

PRELIMINARY STATEMENT.

This case involves only the Act of 1877, as the insured died in 1890. There is no difference between this case and the Phinney case, except that the questions of estoppel, abandonment, waiver and rescission arise in this case upon the admissions made by the demurrer of the facts stated in the answer.

I.

Statement of Proceedings in Court Below.

This action was commenced in the United States Circuit Court for the District of Washington, Northern Division, on the 19th day of October, 1895, to recover the sum of twenty thousand dollars ($20,000) with interest from January 3, 1891, claimed to be due on a policy of life insurance issued by The Mutual Life Insurance Company of New York (Rec., 2, 9).

The answer was demurred to by the plaintiff and the Court sustained the demurrer to the answer and ordered judgment for the plaintiff Hill in the sum of $24,086.60 (Rec., 22).

No opinion was rendered by Hanford, J., in sustaining the demurrer and ordering judgment.

The defendant excepted to the judgment (Rec., 27).

To reverse this judgment the defendant company sued out a writ of error to the United States Circuit Court of Appeals for the Ninth District.

For opinion of Circuit Court of Appeals by Hawley, District Judge, concurred in by Gilbert & Ross, Judges, see record, page 51. Also reported in 97 Federal Reporter, page 263.

In November, 1899, a petition for a writ of certiorari was filed by the defendant company in this Court with a certified copy of the record and brief. This petition and brief was submitted to this Court with brief for Hill opposing application for certiorari (see papers on file).

Writ of certiorari was thereafter granted by this Court Feb. 5, 1900, and filed.

This cause now comes before this Court on a writ of certiorari for hearing on the merits.

II.

Abstract of Pleadings.

The complaint in this action alleges that on the 29th day of April, 1886, the defendant company executed and delivered in the City of New York the policy in question, and that the application for the said policy contained the following agreement:

> "And it is agreed that there shall be no contract of insurance until a policy shall have been delivered and issued by said company, and the first premium thereon paid while the person proposed for insurance is in the same condition of health described in this application; and that if said policy be issued the declarations, agreements and warranties herein contained shall be a part thereof; and the contract of insurance when made shall be held and construed at all times and places to have been made in the City of New York" (Record, page 8).

That the policy was in favor of Hill's wife, if living, and if not their children. That the wife predeceased Hill. That the plaintiffs are their children.

That on the 4th day of December, 1890, George Dana Hill, the insured, died. That the said Hill during his lifetime duly performed all the conditions of the contract.

The Answer.

The plaintiff in answering admits the issuance of the policy, but denies the contract was made or delivered anywhere except in the State of Washington; and further denies the allegation that Hill, during his lifetime, duly performed all the conditions of the contract, and alleges affirmatively,

1st. That the application was made in the State of Washington, the policy delivered in the State of Washington, and the first annual premium was paid in the State of Washington.

2nd. That the premiums due on the 29th days of April, 1887, 1888, 1889 and 1890, had not been paid. The policy by its terms had been forfeited.

3rd. That subsequent to the 29th day of April, 1887, it was mutally agreed between the defendant and said Hill that the contract of insurance should be waived, abandoned and rescinded. By mutual consent the contract was waived, abandoned and rescinded.

4th. That the policy contained the following clause: "Each premium is due and payable at the home office of the company, in the City of New York, but will be accepted elsewhere when duly made in exchange for the company's receipt signed by the president or secretary.

And the answer further alleges: "That upon the execution and delivery of the policy it was mutually agreed between the defendant and Hill that all annual premiums should be paid by the said Hill at the City of Seattle and the defendant's receipt therefor should be at the time of such payment delivered to said Hill at the City of Seattle."

5th. The answer further alleges that the plaintiffs should be and are estopped from and should not be permitted to allege or prove that defendant did not mail, or cause to be mailed, or otherwise given to said Hill, a notice stating the amount of the premium due on said policy on April 29th, 1887, or at any other time (Record, page 21).

The answer further alleges that shortly prior to and after and on said April 29th, 1887, the defendant notified Hill in writing, and personally, that the premium was due

and payable, and demanded payment, and at the same time tendered the receipt. That Hill refused to make payment and then and there intending and for the purpose of inducing defendant to rely upon the same, informed defendant that he, said Hill, was unable to pay said premium, and did not intend to make payment thereof, or of any premium thereafter to accrue upon said policy of insurance, but on the contrary, that he, the said Hill, intended to allow the policy to lapse and become forfeited, and the defendant then and there and ever since relying upon the said representations and conduct on the part of the said Hill was thereby induced to and did declare the said policy and contract of insurance forfeited and abandoned, and in good faith relying on said conduct of Hill in good faith did fail and abstain from giving or mailing any notice, whether prescribed by statute or otherwise, to the said Hill, or to any person interested in the said policy, concerning the payment of any premium thereon. (Record, pages 22 and 23.)

The Demurrer to the Answer.

The plaintiff demurred to the answer on the ground that none of the defenses alleged by the answer stated facts sufficient to constitute a defense to the amended complaint. (Record, page 25.)

III.

Chronological Statement of Facts Admitted by the Pleadings.

1877. Act of 1877 passed.

1886, April 29th. George Dana Hill, a resident of the

State of Washington, executed an application in Seattle, Washington, to the defendant company for a policy of insurance on his life for the sum of $20,000 payable.

This application was forwarded by the agent to the Home Office and pursuant to such application the policy applied for by Hill was issued, bearing date the 29th day of April, 1886, and forwarded from the Home Office in New York to the agent in Seattle who delivered it to Hill upon payment of the first annual premium when the policy was to take effect.

1887. In the month of April and prior to April 29th the defendant notified Hill in writing, and personally, that the premium was due and payable, and demanded payment, and at the same time tendered the receipt. That Hill refused to make payment and then and there intending and for the purpose of inducing defendant to rely upon the same, informed defendant that he, said Hill, was unable to pay said premium, and did not intend to make payment thereof, or of any premium thereafter to accrue upon said policy of insurance, but on the contrary, that he, the said Hill, intended to allow the policy to lapse and become forfeited, and the defendant then and there and ever since relying upon the said representations and conduct on the part of the said Hill was thereby induced to and did declare the said policy and contract of insurance forfeited and abandoned, and in good faith relying on said conduct of Hill in good faith did fail and abstain from giving or mailing any notice, whether prescribed by statute or otherwise, to the said Hill, or to any person interested in the said policy, concerning the payment of any premium thereon.

1888, April 29th. Premium not paid.

1889, April 29th. Premium not paid.

1890, April 29th. Premium not paid.

1890, Dec. 4th. Hill died.

1895, Oct. 19th. Suit commenced.

IV.

Statement of the case required by Rule 21.

The following statement presents succintly the questions involved and the manner in which they are raised.

The first question is, whether the Statute of New York of 1877 applied or not to the business of collecting premiums from non-residents which are not demanded to be paid within the State of New York. The question is raised by the sustaining of the demurrer to the answer and the assignment of errors. (See Point I.)

The second question is, whether or not under the circumstances the policy was or was not a Washington contract governed and construed by the laws of Washington alone and not by the statutes of New York in question. The question is raised by the sustaining of the demurrer to the answer and the assignment of errors. (See Point II.)

The third question is, whether if the premium notice statute of New York of 1877 applies, its equitable and true construction aids the plaintiff in keeping the policy alive. This question is raised by the sustaining of the demurrer to the answer and the assignment of errors thereon. (See Point III.)

The fourth question is, whether if any statutory notice was required the sending of notice was not waived by Hill, and whether actual knowledge possessed and acted upon obviated the necessity for statutory notice. The question was raised by the sustaining of the demurrer to the answer and the assignment of errors thereon. (See Point IV.)

The fifth question is, whether or not the policy in question was not terminated by waiver, estoppel, abandonment and recission, and the question is raised by the sustaining of the demurrer to the answer and the assignment of errors thereon. (See Point V.)

The sixth question is, whether or not it is essential to the maintenance of this action that the Hill beneficiaries should have paid or tendered the premiums before suit. The question is raised by the sustaining of the demurrer to the answer and the assignment of errors thereon. (See Point VI.)

V.

Statement of Questions in Issue as presented in the petition for writ of certiorari.

FIRST.

Whether the contract of life insurance on which the action was brought is one entered into under and governed by the laws of the State of Washington or the laws of the State of New York, when the policy was delivered and the first premium paid in the State of Washington, and whether such statute of the State of New York of 1877, requiring notice to be given as therein prescribed, applies to the State of Washington at all.

SECOND.

Whether actual knowledge, possessed and acted upon by the insured at the time the premium fell due, obviated the necessity of the statutory notice prescribed by said statute of the State of New York.

THIRD.

Whether if such statute does apply to the case, the parties could and did waive the notice therein prescribed by a subsequent agreement entered into in Washington.

FOURTH.

Whether it was competent for the Legislature of the State of New York, under the said general statute of 1877, to alter and amend the charter of your petitioner, and if so, whether your petitioner, being a corporation created and chartered under a special act of the Legislature of the State of New York, was intended to be included and affected by said general act.

FIFTH.

Whether it was or is the meaning and intent of the Legislature of the State of New York, that the act of 1877, should apply to a business transaction taking place in the State of Washington, as disclosed by the record in this case, and whether said statute follows said corporation beyond the limits of the State of New York as a part of its charter, or whether the same is only operative in the State of New York upon corporate business there transacted.

SIXTH.

Whether the public policy of unrestricted liberty of contract conferred by its Legislature upon foreign corporations transacting business in the State of Washington, should be a controlling reason for determining the

contract a Washington contract, and one not affected by the statute of New York.

SEVENTH.

If it should be held that the general statute of New York of 1877, respecting premium notices applies to this case, whether the failure to give the notice prescribed by such statute can operate to render your petitioner liable for a greater measure of insurance than the amount of the premium paid will purchase.

EIGHTH.

In the event it should be held the statute of New York of 1877, as amended applies to this case, whether the penal consequences of failing to give the notice prescribed of premium falling due, will relieve the insured from paying further premiums and keep the policy alive as if such premiums had been paid.

NINTH.

Whether the failure to give notice of a particular premium maturing will have the effect of keeping the policy alive, notwithstanding subsequent premiums have not been paid.

TENTH.

Whether, although your petitioner failed to give the

notice under the statute of New York of 1877, and the premiums due on each of the following four years preceding the death of the insured remained unpaid, it would be an unlawful appropriation of your petitioner's property without consideration, to require your petitioner, in case of the death of the insured, to pay the amount of the policy.

ELEVENTH.

In the event the statute of New York of 1877, should be held to apply, whether an action can be brought to recover the amount of the policy until payment has been made or tendered of the premiums past due and unpaid.

TWELFTH.

Whether, in event it is held that the Statute of New York applies, it is a law relieving the insured from the consequences of a breach of his contract ; or whether it enters into the being and charter of the Mutual Life Insurance Company, and becomes a limitation upon its powers of contracting outside the State of New York.

THIRTEENTH.

Whether it was competent for the Mutual Life Insurance Company and the insured to enter into a mutual agreement in the State of Washington subsequent to the delivery of the policy, by which they mutually agreed to rescind and terminate the policy and each relieve the other from all its obligations and benefits.

FOURTEENTH.

Whether by the payment of the first annual premium and failing to pay all subsequent premiums, action can be maintained until payment or tender is made of the defaulted premiums.

FIFTEENTH.

Whether, in this action, pleading only the policy of insurance and of performance by the insured of the terms of the contract, a recovery can be had when plaintiff admits non-payment of all premiums subsequent to the first up to the death of the insured.

SIXTEENTH.

Whether, in this action, based upon the policy of insurance and the performance of its conditions, the plaintiff can admit the non-payment of the premiums subsequent to the first and recover against the defendant because the defendant fails to show the giving of notice pursuant to the statute of New York.

SEVENTEENTH.

Whether it is not a fatal departure from law to law for a plaintiff alleging as his cause of action a policy of insurance and the compliance with its terms and admitting the defense of non-payment of premiums to recover judgment because the defendant has failed to show compliance with the unpleaded statute of New York in regard to mailing notice of the due date of premium.

EIGHTEENTH.

Whether under the charter of the defendant company and the Statutes of the State of Washington and the State of New York and the matters set forth in the record herein there is any liability on the part of the company.

VI.

Specification of Errors.

The following are the errors assigned by the plaintiff in error, and upon which it relies for the reversal of this cause.

I.

The said Court erred in sustaining the demurrer of the plaintiff and defendant in error to the first and second and third affirmative answers and defenses of defendant and plaintiff in error (Assignment of Errors I, II and III, Record, p. 29).

II.

The said Court erred in sustaining the demurrer of the plaintiff and defendant in error to the answer of the defendant and plaintiff in error (Assignment of errors, IV, Record p. 29).

III.

The said Court erred in granting judgment in favor of plaintiff and defendant in error against defendant com-

pany and plaintiff in error for the amount of said judgment, or any (V) sum and (IV), because it was manifest upon the issues formed in said cause that said plaintiff and defendant in error was not entitled to judgment (Assignment of errors V, VI, Record, p. 29).

IV.

The said Court erred in not submitting said cause to trial upon the issues formed by the pleadings (Assignment of errors VII, Record p. 30).

See also the brief filed on the application for the certiorari.

POINT I.

The premium notice statute of New York of 1877 (Hill died in 1890), never had any application to the Hill policy because that statute did not apply to the business of collecting premiums demanded to be paid outside the State of New York. The contract was not subject to this particular statute of New York because by its true construction it had no application.

For the argument on this point see Phinney Brief, Point II, at page 59.

As the policy in this case was issued in 1886, and as Hill died in 1890, there is no question whatever in the case of the operation of any other statute during the life of the policy except the Statute of 1877.

In this case the answer *alleges* and the demurrer to the answer *admits*

That upon the execution and delivery of the policy it was mutually agreed between the company and Hill that all annual premiums should be paid by the said Hill at the city of Seattle, and that the company's receipt therefor should be at the time of such payment delivered to said Hill at the city of Seattle.

The Hill case, therefore, is one where the business of collecting the premiums was undeniably in the State of Washington.

POINT II.

Under the circumstances surrounding the application for the issuance and the delivery of the Hill policy in the State of Washington it was a Washington contract and under the true doctrine of the conflict of laws the New York Statute of 1877 was not the law of this contract.

For argument on this point see Phinney Brief, Point III, at page 79; also Cohen Brief, Point II. See also the opinion of the California Court in the case of Rosson *v.* Equitable, appended to the Cohen Brief.

POINT III.

But if this Court should hold contrary to our contention in Point I as above, that the statute of 1877 apply to this contract and to the business of collecting premiums outside the State of New York, then it is submitted that the equitable and true construction of the statute so found applicable is that the statute operated on the first default alone without notice and did not preserve the contract forever on successive defaults, and further that the forfeiture of the premiums already paid was all that was prohibited.

For argument on this point see Point IV in Phinney Brief, page 94.

POINT IV.

If the Court holds that the true construction of the statute of 1877 required a notice to be sent Hill unless waived, then it is claimed by the plaintiff in error the sending of any statutory notice was waived by Hill by the express terms of the policy, and that actual knowledge, possessed and acted upon by Hill, obviated the necessity for statutory notice.

For argument on this point see Point V, Phinney Brief, p. 116, and Point VI., page 143.

It is admitted by the demurrer to the answer in this case that shortly prior to and after and on said twenty-ninth day of April, 1887, this defendant in writing, and also personally, notified and informed the said George Dana Hill, at said city of Seattle, that the premium of eight hundred and fourteen dollars, necessary to be paid on said policy for the continuance of said policy of insurance, was due and payable, and said defendant duly demanded payment of said premium in said sum, and at the same time and place tendered the receipt of the defendant therefor, duly signed by its president and secretary; and the said Hill being fully so informed and advised in the premises refused to make payment of said premium, or any part thereof, and then and there intending and for the purpose of inducing defendant to rely upon the same, informed defendant that he, the said George Dana Hill, was unable to pay said premium, and did not intend to make payment thereof, or of any premium thereafter to accrue upon said policy of insurance, but on the contrary he, the said George Dana Hill, intended to allow the said policy to lapse and become forfeited for want of payment of said premium, or of any future premium accruing on said policy; and the said defendant, then and there and ever since relying upon the said representations and conduct on the part of the said George Dana Hill was thereby induced to and did declare the said policy and contract of insurance forfeited and abandoned, and in good faith relying upon said conduct and representations on the part of said George Dana Hill, this defendant was induced to and did fail and abstain from giving or mailing any notice, whether prescribed by statute or otherwise, to the said George Dana Hill, or to any person interested in said policy, concerning the payment of any premium thereon.

POINT V.

The contract was abandoned by Hill and this he had a right to do.

For argument on this point see Phinney Brief, Point VI., p. 143.

The Circuit Court of Appeals in affirming the judgment herein, said in reference to the contentions in above Point IV and this Point III as follows:

"The plea of estoppel, as set forth in the third affirm-
"ative defense, is but another name for waiver. There is
"no question concerning the plea of estoppel that can be
"distinguished from the question as to the plea of
"waiver. As the parties could not waive the require-
"ments of the statute, as to the manner in which the
"policy could be forfeited, how could the beneficiaries
"who had vested rights therein be divested of such rights,
"except in the manner provided by law? They cer-
"tainly could not be bound by any declarations which
"their father may have made in his life time to any agent
"or officer of the insurance company, as to his inability
"to pay the premium then due upon the policy; or that
"he did not intend to pay that, or any future premium;
"or that the insurance company might consider the policy
"forfeited without giving the notice specified in the
"statute. To so hold would entirely abrogate the pro-
"visions of the statute and of the policy" (Rec., p. 65).

The law applicable to the *admitted* facts is fully set forth in the waiver, Phinney brief and reply brief.

The Circuit Court misapprehended the relation of Hill to this policy.

Hill applied for the policy, and himself paid the first premium.

The act of 1877, if applicable, requires the notice to be addressed and mailed *not to the beneficiaries*, but to "*the persons whose life is assured.*" That is, the statutory

provisions as to notice related solely to *Hill* (for there was no assignment in this case). If Hill was the only person entitled to notice, then Hill was the person who could waive such notice. Hill was under no obligation as between himself and the beneficiaries to pay the premium. The beneficiaries were entitled to no notice. They could, of course, have paid the premium if they had wished to do so. Hill's wife, the first beneficiary, was alive on April 29, 1887, when the second premium became due and was not paid.

The question is not whether Hill could surrender a live policy without the wife's or children's consent. This policy was lapsed and forfeited by its terms, and by such terms the wife and children had no interest. The lack of notice to Hill himself is claimed to keep it alive, and the only question is whether the person entitled to notice may not so conduct himself as to render lack of notice to *him* inoperative. Hill was under no obligation to his wife and children to pay the premium, and likewise he could be under no obligation to them to do or abstain from doing anything which would render the lack of notice operative or inoperative.

POINT VI.

The alleged cause of action was not pleaded, and there was departure. See Phinney brief. Point VII.

POINT VII.

The judgment should be reversed.

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